Supreme Court, U.S.
FILED
MAR 5 1993
OFFICE OF THE CLERK

No. 92-1298

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SAN FRANCISCO POLICE OFFICERS ASSOCIATION,
Petitioner,

VS.

CITY AND COUNTY OF SAN FRANCISCO, et al.,
OFFICERS FOR JUSTICE, et al.,
UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief of Respondent, Officers for Justice, et al.

ARMANDO M. MENOCAL, III
LAURA J. SCHULKIND*
PUBLIC ADVOCATES, INC.
1535 Mission Street
San Francisco, CA 94103
Telephone: (415) 431-7430
Attorneys for Officers for Justice, et al.

**Counsel of Record*

BOWNE OF SAN FRANCISCO, INC. • 343 SANSOME ST. • S.F., CA 94104 • (415) 362-2300

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
I. THE HISTORICAL CONTEXT	2
A. Pre-Consent Decree History	3
B. The Consent Decree	5
C. Post-Consent Decree History	6
II. THE CITY PROPOSAL	7
III. PROCEDRUAL HISTORY OF THE INSTANT DISPUTE	8
REASONS TO DENY CERTIORARI	9
I. INTRODUCTION	9
II. THE REASONS PRESENTED BY PETITIONER FOR GRANTING CERTIORARI ARE UNRELATED TO THE ISSUES CENTRAL TO DISPOSITION OF THIS CASE	10
III. NONE OF THE UNION'S REASONS FOR GRANTING CERTIORARI TURNS ON ISSUES OF LAW	11
A. The Union's Argument Regarding the Uniform Guidelines of Employee Selection Turns on Questions of Fact Not Law	11
B. The Union's Sole Challenge Under the 1991 Civil Rights Act Rests on an Untimely, Factual Challenge Regarding the Nature of the City's Proposal—Not the Meaning of the Act	13
C. The Question of Retroactivity of the 1991 Civil Rights Act is Unnecessary to Disposition of this Case, and this Case is Unnecessary for the Illumination of Retroactivity Principles	14
D. Accepting the Union's Equal Protection Argument Requires Reversing the District Court's Interpretation of its Own Consent Decree	15
CONCLUSION	17

TABLE OF AUTHORITIES

Cases

Page

Anderson v. Bessemer City, 470 U.S. 564, 573 (1985) 13
Brown v. Neeb, 644 F.2d 551 (6th Cir. 1981) 16
Harvis v. Roadway Express, Inc., 973 F.2d 490 (6th Cir. 1992), *cert. granted sub nom. Rivers v. Roadway Express, Inc.*, 61 U.S.L.W. 3437 (U.S. Feb. 22, 1993) (No. 92-938) 15
Landgraf v. USI, 968 F.2d 427 (5th Cir. 1992), *cert. granted*, 61 U.S.L.W. 3371 (U.S. Feb. 22, 1993 (No. 92-757) .. 15
Officers for Justice v. Civil Service Comm'n, No. 91-16519 (9th Cir. Nov. 5, 1992) ..... *passim*
Officers for Justice v. Civil Service Comm'n, Nos. C-73-0657 & C77-2884 (N.D.Cal. August 21, 1991) *aff'd* No. 91-16519 (9th Cir. Nov. 5 1992) ..... *passim*
Officers for Justice v. Civil Service Commission, 473 F.Supp. 801 (N.D.Cal. 1979) *aff'd*, 688 F.2d 615 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983) 3-4, 5
Officers for Justice v. Civil Service Comm'n, 14 Empl. Prac. Dec. 7548 (N.D.Cal. 1977) 4, 6
Officers for Justice v. Civil Service Comm'n, 14 Empl. Prac. Dec. 7549 (N.D.Cal. 1977) 4
Officers for Justice v. Civil Service Comm'n, 371 F. Supp. 1328, 1333 (N.D.Cal. 1973) 3
San Francisco Police Officers Association v. City and County of San Francisco, 812 F.2d 1125 (9th Cir. 1987) 6
Vertex Distributing, Inc. v. Falcon Foam Plastics, Inc., 168 F.2d 885 (9th Cir. 1982) 16

Statutes

Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat 1071 (1991) ..... *passim*

Federal Regulations

Uniform Guidelines on Employee Selection Procedures 29 C.F.R. § 1607 et seq. ..... *passim*

No. 92-1298

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SAN FRANCISCO POLICE OFFICERS ASSOCIATION,
Petitioner,

VS.

CITY AND COUNTY OF SAN FRANCISCO, et al.,
OFFICERS FOR JUSTICE, et al.,
UNITED STATES OF AMERICA,
Respondents.

RESPONSE OF PLAINTIFFS TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT OF THE CASE

This appeal arises out of the Ninth Circuit's unanimous decision authored by Chief Judge Wallace, upholding a voluntary application of an affirmative action device known as the "sliding band". *Officers for Justice v. Civil Service Comm'n*, No. 91-16519 (9th Cir. Nov. 5, 1992) (hereafter "*Officers for Justice* (Cir.)") (appended to Petitioner's writ at 1a).[1] Appeal is brought by the Police Officers Association (the Union).

The Ninth Circuit opinion, affirming Judge Peckham in the district court, upheld the City of San Francisco's proposal to apply voluntarily the sliding band in order to mitigate the adverse impact of a particular set of police sergeant and assistant inspec-

[1] Page cites to this opinion will refer to the appendix attached to Petitioner's writ.

tor exams administered in 1989. That proposal allows the City to treat a statistically-determined range, or "band", of scores as equivalent for the purpose of employee selection. Selection from within the band of scores is based on the application of four criteria including professional conduct, job performance, education, and the City's affirmative action goals with regard to its police department. *Officers for Justice v. Civil Service Comm'n*, Nos. C-73-0657 & C-77-2884 at 46a (N.D.Cal. August 21, 1991) *aff'd* No. 91-16519 (9th Cir. Nov. 5 1992) (hereafter "*Officers for Justice* (D.Ct.)").[2]

There is no conflict in the circuits on the permissibility of banding. No circuit has held voluntary use of the sliding band to be illegal, nor has any circuit supported the Union's position that an employer is required to utilize strict rankorder selection unless and until it proves the selection device to be invalid.

I. THE HISTORICAL CONTEXT

As Judge Wallace noted, the City's proposal "must be viewed within the historical context of this litigation." *Officers for Justice* (Cir.) at 10a. That history spans a twenty-year period begining with the "undisputed history of discrimination" upon which the Consent Decree in this case is based. *Id.* at 3a. Further, the full twenty years—and more—have been marked by an inability to develop sergeant or assistant inspector exams without profound adverse impact against minorities.

This history has also been marked by numerous conflicts among the four parties[3] to this case over the meaning of the underlying Consent Decree. It was the interplay among the four parties which produced this Decree and the relief under review

---

[2] Page cites to this opinion refer to the appendix attached to Petitioner's writ.

[3] The lawsuit was filed by the original, private, plaintiffs in this action, Officers for Justice, et al., against the original defendants, Civil Service Commission of San Francisco, et al. The Police Officer's Association intervened as a defendant. The United States filed a separate lawsuit against the City and the two cases were consolidated.

here. While all parties ultimately did not support the City's proposal, its final shape was influenced in significant ways by the parties' various and competing interpretations of the Decree. Unraveling the meanings of the Decree would necessarily be central to a review of the City's banding proposal. In fact, much of the Union's argument for granting certiorari is based on its unique interpretation of the Decree.

A. Pre-Consent Decree History

In 1973, private plaintiffs, Officers for Justice et al., filed this lawsuit against the San Francisco Civil Service Commission, the Police Commission and the Chief of Police charging racial and sexual discrimination. The Police Officers Association (the Union) intervened to oppose the suit.

That same year, the first preliminary relief was granted in this case—and it related to sergeants exams.[4] Judge Robert F. Peckham—the judge who presided over this case from its inception until his death two weeks ago—found that the sergeant examinations for 1967, 1968 and 1971 all had an adverse effect on the opportunities of minority officers for advancement within the department. *Officers for Justice v. Civil Service Comm'n*, 371 F. Supp. 1328, 1333 (N.D.Cal. 1973). As a result of this discrimination, less than three percent of the sergeants in the police department at that time were black, latino or asian. Id. The district court concluded, "[t]he evidence, in short, establishes a prima facie showing of de facto discrimination with respect to the sergeant examination." *Id.*[5]

---

[4] For the sake of brevity, this statement focuses on the Department's historic inability to develop nondiscriminatory sergeant and assistant inspector exams—since those are the exams at issue in the instant dispute. However, over the course of the Decree and the litigation leading up to the Decree, there were numerous other disputes resolved by Judge Peckham regarding a variety of employment practices, such as: entrance exams, height requirements, agility tests, lieutenant and captain exams and temporary appointment practices.

[5] The findings of discrimination over the history of this litigation were by no means limited to sergeants exams. *See, e.g., Officers for Justice v.*

Then, in 1976, sergeant and assistant inspector exams were ain offered, and again both had adverse impact.[6] Further, with ag gard to temporary sergeant promotions (made during this time re e to delays in exam development) Judge Peckham stated: du

> We note with dismay that, given a free choice, defendants have chosen to utilize what is perhaps the most discriminatory possible criteria in light of this court's finding of discrimination at the Q-2 level, from whose ranks such promotions are made. It therefore comes as no surprise that virtually none of the temporary promotions made to date are minorities. We also note that defendants' ability to promote for an indefinite period on the basis [of] seniority under the limited tenure rule dissipates any incentive to design a validated exam permitting permanent appointments in accordance with our 1973 order. We find the inference strong that the three-years delay in designing such an exam is not a mere coincidence.

Officers for Justice v. Civil Service Comm'n, 14 Empl. Prac. Dec. 7548 at 4718 (N.D.Cal. 1977).

In 1977, the United States sued the City for discriminatory employment practices, and the two suits were consolidated. Once the United States joined the case, negotiations began in earnest and in the Spring of 1978, the private and public plaintiffs and the City reached a tentative settlement. However, the Union opposed and settlement was not achieved. Judge Peckham then granted the United States' motion for partial summary judgment on a variety of matters including the 1971 sergeant's exam. *See Officers for Justice v. Civil Service Commission*, 473 F.Supp. 801, 804 (N.D.Cal. 1979) *aff'd*, 688 F.2d 615 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983).

Civil Service Commission, 473 F.Supp. 801, 809 (N.D.Cal. 1979) *aff'd*, 688 F.2d 615 (9th Cir. 1982), cert. denied, 459 U.S. 1217 (1983) ("The plaintiffs have, during the course of this litigation introduced substantial evidence of intentional discrimination by the defendants."); *Id.* at 804.

[6] In 1977, Judge Peckham also enjoined use of the assistant inspector exam because of adverse impact, *Officers for Justice v. Civil Service Comm'n*, 14 Empl. Prac. Dec. 7549 (N.D.Cal. 1977).

B. The Consent Decree

Trial on all remaining issues in dispute commenced in November of 1978. After two weeks of trial, proceedings were suspended to allow for further negotiations, and the parties reached agreement on what is now the Consent Decree underlying this case. Judge Peckham held a fairness hearing on March 5, 1979, and the Decree was approved by the court. *Officers for Justice v. Civil Service Commission*, 473 F.Supp. 801 (N.D.Cal. 1979) aff'd, 688 F.2d 615 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983). The Union is a signatory to the decree, and does not contest its validity.

The Consent Decree calls for specific, definable and good faith efforts on the part of the City to achieve certain goals for the employment of women and minorities within specific periods of time. *Officers for Justice* (D.Ct.) at 19a; *Officers for Justice* (Cir.) at 3a. Specifically, the Decree provides a long-term goal of 45 percent minority representation in the Department. Further, it calls for the promotion of women and minorities in proportion to their representation in the qualified applicant pool. *Officers for Justice* (D.Ct.) at 20a.

The Decree also prohibits the City from using any examination which has a disproportionately adverse impact against minorities or women, unless the examination is validated pursuant to the Uniform Guidelines on Employee Selection Procedures (29 C.F.R. § 1607 et seq. (hereafter "Uniform Guidelines")). *See Officers for Justice* (D.Ct.) at 19a; Consent Decree para. 4 (Petitioner's App. at 68a). As such, the Decree incorporates the standards under the Uniform Guidelines for evaluating promotional examinations which have an adverse impact on minorities. *Officers for Justice* (D.Ct.) at 29a.

Further, the Decree prohibits the City from "unlawfully discriminating in any manner on the basis of sex, race, or national origin." *Id.* at 20a. "Unlawful discrimination" is defined by the parameters of Title VII and the Constitution and does not create an additional barrier to the use of otherwise lawful, voluntary affirmative action plans. *Id.* at 34a; *Officers for Justice* (Cir.) at 12a.

C. Post-Consent Decree History

In 1981, just two years after entering into the Decree, the City was found to have failed to make a good faith effort under the Decree in recruitment and temporary promotions. Order (Dec. 1981). Failure at the recruitment and temporary promotion levels directly affects the permanent promotion of minorities. For example, Judge Peckham noted, "[t]hose who gain experience as [temporary] sergeants may possess a substantial advantage in taking examinations for permanent positions . . . ." *Officers for Justice*, 14 Empl. Prac. Dec. 7548 at 4718.

Then, in 1983 examinations for these positions were administered for the first time under the Decree; again, both exams produced severe adverse impact against minorities. *San Francisco Police Officers Association v. City and County of San Francisco*, 812 F.2d 1125, 1126 (9th Cir. 1987). The Police Commission employed a reweighting device in an attempt to cure the adverse impact. This approach was ultimately held to be illegal by the Ninth Circuit. *Id.*[7]

Three more years passed without the offering of sergeant or assistant inspector exams. This delay triggered the district court, in 1986, to enter a supplemental order designed to alleviate the delay and the adverse impact which had plagued these exams. However, the Supplemental Order failed to produce either result. The deadline of December, 1986 for new sergeant and assistant inspector exams came and went. And, when these exams were finally administered in December of 1989[8] (three years late and

---

[7] The district court found that the banding proposal at issue here is factually distinct from the reweighting scheme. *Officers for Justice* (D.Ct.) at 40a-42a.

[8] When, by August, 1989, still no sergeant or assistant inspector exam had been offered, the Court entered an order modifying the 1986 Order, requiring the City to offer sergeant and assistant inspector exams by December 1989. Order, 3 (Aug. 1989).

six years after the last sergeant and assistant inspector exams) the adverse impact was severe.[9]

II. THE CITY PROPOSAL

In response to the disparate impact of the 1989 exams, the City proposed to utilize a device known as "banding". "Banding is premised on the belief that minor differences in test scores do not reliably predict differences in job performance." *Officers for Justice* (Cir.) at 5a. *See Officers for Justice* (D.Ct.) at 24a. As such, through the use of "well-worn statistical principles which reflect the reliability of the examinations[,]"(*Officers for Justice* (D.Ct.) at 24a) a range of scores is articulated which an employer may reasonably treat as equivalent.

For the particular exams at issue in this case, the band width, on a 100 point scale, has been calculated to be approximately 4.00 points for the assistant inspector examination and 5.48 points for the sergeant examination. *Id.* Once the band width is properly calculated, the employer is free to select any candidate from within the band. However, "no candidate [is] denied a promotion in favor of another whose score is statistically significantly lower than his or hers." *Officers for Justice* (Cir.) at 5a.

Under the banding proposal ultimately approved in this case, selection from within the band is based on four criteria: professional conduct, including good conduct, the absence of disciplinary actions, and the absence of sustained citizen complaints; job-related performance and achievement; job-related education,

---

[9] The City's failure in the area of promotions is not limited to its failure to develop exams free of adverse impact. The inordinant delay in offering exams violated the City's obligation to appoint sergeants and assistant inspectors on an annual basis. Consent Decree, paras. 10(a)(3) & (b)(2)(Petitioner's App. at 73a). Further, as a result of this delay, the City has never achieved the orderly promotions or long range planning envisioned by the Decree; nor has it developed or provided the in-service training program for sergeants and assistant inspectors or the middle management training curriculum required by the 1981 Order. The failure to develop these programs goes a long way toward explaining the City's inability to achieve an exam free of adverse impact.

training, experience and career development; and the Department's affirmative action goals. *Officers for Justice* (D.Ct.) at 46a. Under the approved procedure, all candidates whose scores fall within the band are considered on the basis of these criteria. The criteria are applied by a three-person panel consisting of the Department's affirmative action officer and two police officers holding a permanent rank of lieutenant or higher. *Id.* at 45a.

Under the approved plan, out of a pool of 747 candidates, the City proposed promoting 100 sergeants in rank order and creating a single band from which fifteen additional sergeant appointments would be made. *Id.* at 28a. Sixty assistant inspectors would also be promoted in rank order. *Id.* No further assistant inspector appointments were proposed. However, should the need arise, the City proposed to use banding to make those appointments. *Id.*

III. PROCEDRUAL HISTORY OF THE INSTANT DISPUTE

This dispute originally came before the district court at the request of the City. *Officers for Justice* (D.Ct.) at 15a. Desirous of implementing banding to mitigate the adverse impact of its most recent sergeant and assistant inspector exams, it foresaw opposition from the Union. Thus, the City sought declaratory relief prior to proceeding. *Id.* at 16a.

The matter was set for trial and five experts testified for two-and-a-half days regarding the statistical validity of the City's proposal. *Id.* at 24a. Pre-trial and post-trial briefing, as well as closing arguments were presented by the parties.

On June 6, 1991, the court struck down the City's initial proposal, which proposed to use race as the sole criterion for selection from within the band. Judge Peckham, however, recognized that banding as a concept was acceptable, and that a modified proposal would be reconsidered. *Id.* at 27a.

On June 28, the four-criteria selection method described above was submitted and briefed by the parties. The court also heard argument. On August 21, 1991, in a lengthy opinion, well-grounded in the factual record, Judge Peckham approved the modified proposal and the Union appealed.

Subsequent to the district court ruling, the Civil Rights Act of 1991[10] was enacted and on that basis the Union sought a stay pending appeal. The Union's arguments regarding the Act were briefed and argued in the district court, and upon denial of the stay, again briefed in the court of appeals. The stay was then denied by the Ninth Circuit.

The Union's banding appeal was argued in July, 1992 and a unanimous panel headed by Chief Judge Wallace upheld the City's modified proposal in November of 1992.

REASONS TO DENY CERTIORARI

I. INTRODUCTION

In upholding the City's banding proposal, Chief Judge Wallace stated:

> [W]e find that the efforts exerted in this process culminated in a unique and innovative program which succeeds in addressing past harms to minorities while minimizing future harmful effects on nonminority candidates. The successful efforts of all parties and the district court in reaching this resolution are to be lauded.

Officers for Justice (Cir.) at 14a. The Ninth Circuit recognized precisely that which the Union is attempting to obscure—that the proposal at issue represents a voluntary effort under which a local government fashioned a measure designed to mitigate the adverse impact of a particular set of exams, redress the effects of past discrimination, and further compliance with its consent decree obligations.

In challenging the results of this voluntary effort, the Union asserts that the Ninth Circuit has somehow coerced the City into adopting this measure. However, nothing could be further from the truth; the City voluntarily proposed, designed and defended the measure under review.

---

[10] Pub. L. No. 102-166, 105 Stat 1071 (1991).

Ironically, it is the Union's analysis which would remove all discretion from an employer's hiring decisions—not the Ninth Circuit's ruling. The Ninth Circuit has merely ratified a city's voluntary affirmative action plan. However, under the Union's analysis, employers must be slaves to psychometricians and rank-order selection. According to the Union, unless an employer proves an exam invalid, it may not deviate in any way from rank-order selection. In other words, subsequent to administration of an examination process under which all candidates are treated equally regardless of race, an employer is prohibited from taking into consideration such factors as an employee's disciplinary record, educational background, or affirmative action as it pertains to the needs of the agency. This stark view of an employer as lacking all discretion in personnel decisions is without any legal support.

II. THE REASONS PRESENTED BY PETITIONER FOR GRANTING CERTIORARI ARE UNRELATED TO THE ISSUES CENTRAL TO DISPOSITION OF THIS CASE

As an initial matter, it should be noted that the Union's arguments tend to emphasize issues irrelevant to disposition of this case. Thus, a brief comment is called for to alert this Court to what this case is *not* about.

First, this case is not about what the City can be required to do. As noted above, at issue here is a voluntary affirmative action measure proposed, designed and defended by the City.

Second, this case is not about the selection device utilized by the City in 1983 referred to as "reweighting". Reweighting and banding are two factually distinct selection methods which were applied to two different sets of exams at two different times in history. Their many differences were briefed in the district and appellate courts, and as a factual matter the district court held that the two approaches are distinct (*Officers for Justice* (D.Ct.) at 40a-42a) and the Ninth Circuit affirmed. *Officers for Justice* (Cir.) at 14a.

Third, this case is not about what an employer may or may not do with an exam that has been proven to be valid. Plaintiffs deliberately put off a validity challenge in hopes that the City

would develop an alternative selection method—which it did. However, plaintiffs did not waive their right to challenge the validity of the exams, and their validity has never been proven.

Fourth, this case is not about the retroactivity of the 1991 Civil Rights Act. The Ninth Circuit did not even reach the issue stating: "It is unnecessary to reach th[e] [retroactivity] issue, however, because the Union's argument on the merits is incorrect." *Id.* at 8a.

Fifth, this case is not about Title VII. As Judge Wallace noted, "[t]he Union does not challenge the propriety of the affirmative action program under traditional Title VII analysis." *Id.* at 7a. Rather, The Union's sole Title VII challenge rests on its interpretation of the 1991 Civil Rights Act. *Id.*

Sixth, this case is not about the equal protection clause. The Union's sole equal protection argument rests exclusively on its interpretation of the underlying Consent Decree and not the Constitution at all.

III. NONE OF THE UNION'S REASONS FOR GRANTING CERTIORARI TURN ON ISSUES OF LAW

The Union bases its petition for certiorari on five grounds—every one of which asks this Court to overturn well-grounded factual findings or reverse the district court's interpretation of its own consent decree. Thus, none of the Union's arguments turn principally on issues of law.

A. The Union's Argument Regarding the Uniform Guidelines of Employee Selection Turns on Questions of Fact Not Law

The Union's argument regarding the Uniform Guidelines of Employee Selection relies on this Court reversing two findings of fact—not law.

First, the point of the Union's argument is to challenge the underlying factual conclusion that the City's proposal is substantially equally valid to rank-order selection. If the Court does not reverse this conclusion of fact, the Union's argument fails.

On the question of substantial equivalence Judge Wallace concluded:

> The district court, after hearing extensive expert testimony, decided that the City's computation of the band was appropriate .... The district court heard evidence that the test scores themselves are imprecise measurements of future job performance and that by banding the scores and considering secondary criteria in making promotion decisions, the City may increase the probability that the most qualified candidates will be promoted. The district court did not clearly err in finding that banding, as proposed by the City is more valid, or at least "substantially equally valid" to rank order promotions.

Officers for Justice (Cir.) at 13a.

Second, the Union attempts to make its case by assuming without proving that the City's proposal is an "*ad hoc*" measure. In framing the issue for this Court, the Union suggests that the Ninth Circuit found the City proposal to be *ad hoc*, but nonetheless required its use under the Uniform Guidelines. However, this is not the case: both lower courts concluded—as a matter of fact—that the City's proposal is not an *ad hoc* measure.

Judge Peckham made numerous factual findings regarding the City's proposal which run counter to the Union's depiction. For example, he concluded:

> —[T]he instant plan establishes no quotas. The plan "merely authorizes that consideration be given to affirmative action concerns when evaluating qualified applicants."

Officers for Justice (D.Ct.) at 38a (citations omitted).

> —The proposal provides for consideration of race only insofar as the merit principle can be preserved ....

Id. at 39a.

> —Before the examinations were given ... [c]andidates were informed that banding of scores was possible.

Id. at 41a.

> —[The plan] does not require the hiring of any person not qualified for the job. . . . Thus, the City may waive its affirmative action objectives if no minorities fall within the highest band.

Id. at 44a.

In affirming, Judge Wallace described the City plan as "a facially neutral way to interpret actual scores and reduce adverse impacts on minority candidates while preserving merit as the primary criterion for selection." *Officers for Justice* (Cir.) at 14a.

Thus, the Union's argument, at center, does not address the meaning of the Uniform Guidelines, but underlying factual conclusions regarding the nature of the City's proposal. However, despite the clear factual findings of the courts below, the Union merely assumes that the City's proposal is *ad hoc* and offers no basis for concluding that the district and appellate courts' conclusion otherwise was clearly erroneous. *See Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985) (factual findings reviewed under clearly erroneous standard). Yet, if the Court is not inclined to reverse the district and appellate courts' factual findings as clearly erroneous, then the rest of the Union's argument on this score is of no consequence.

B. The Union's Sole Challenge Under the 1991 Civil Rights Act Rests on an Untimely, Factual Challenge Regarding the Nature of the City's Proposal—Not the Meaning of the Act

First, the Union's attempt to suggest that the City's proposal violates section 106 of the Act is not timely. As Judge Wallace noted, the Union did not raise or discuss this issue until its appellate reply brief, and therefore the issue has been waived.[11] *Officers for Justice* (Cir.) at 9a.

---

[11] It is also worth noting that until raising this issue in its reply brief, the Union had repeatedly conceded in the proceedings surrounding its motion for stay that the Section 106 prohibition against race norming did not apply to banding, in that banding is not a score manipulation.

Second, the Union's challenge is fundamentally factual. It argues that review should be granted because the "Ninth Circuit has construed the Civil Rights Act of 1991 in a manner that thwarts the clearly declared congressional purpose of prohibiting the manipulation of civil service examination results as a means for achieving racial quotas in hiring and promotion." Petition for Writ of Certiorari, 24 (undated). Whether or not that is the clearly declared congressional purpose is irrelevant if the particular plan under review does not manipulate scores or involve racial quotas. On these factual matters the district court was clear: it made specific factual findings, grounded in the record, that banding does *not* involve score manipulation and does not constitute a racial quota. For example, Judge Peckham stated:

> Banding will not alter or manipulate the scores of candidates; nor will it allow the selection of candidates whose scores are statistically, reliably lower over other candidates.

Officers for Justice (D.Ct.) at 40a. *See id.* at 42a (same). Further:

> [the plan] is not a quota and does not require the hiring of any person not qualified for the job.

Id. at 44a. *See id.* at 38a (same).

The Union assumes without proving the underlying factual basis for its argument. No where does it argue—let alone establish—that Judge Peckham's factual findings were clearly erroneous.

C. The Question of Retroactivity of the 1991 Civil Rights Act is Unnecessary to Disposition of this Case, and this Case is Unnecessary for the Illumination of Retroactivity Principles

The Union's argument regarding the retroactivity of the 1991 Civil Rights Act is not appropriate for review since, as noted above, resolution of this question was unnecessary to disposition of this case and was therefore not even reached by the courts below. In other words, there is no reason for this Court to reach the question of retroactivity unless it is prepared to apply the Union's substantive interpretation of the Act. As noted above, the Union's substantive argument regarding the Act is fact-based,

untimely, inconsistent with prior positions it has taken on the meaning of the Act, and without a shred of legal support.

The retroactivity issue is tangential to the main issues of dispute and is being used by the Union in an attempt to inflate the importance of this case. In fact, as the Union's own presentation of the issue demonstrates, its retroactivity argument rests on the idiosyncratic chronology of this particular case. The Union hangs its entire argument on the fact that the Civil Rights Act was enacted during the small window of time between the district court's ruling and the City's carrying out that ruling. No broad principles would be clarified by scrutinizing the facts of this case. Moreover, the Court has already identified more illustrative cases for evaluating the retroactivity issue. *See Harvis v. Roadway Express, Inc.*, 973 F.2d 490 (6th Cir. 1992), *cert. granted sub nom. Rivers v. Roadway Express, Inc.*, 61 U.S.L.W. 3437 (U.S. Feb. 22, 1993) (No. 92-938); Landgraf v. USI, 968 F.2d 427 (5th Cir. 1992), *cert. granted*, 61 U.S.L.W. 3371 (US Feb. 22, 1993 (No. 92-757). Thus, this case has nothing to offer the retroactivity debate except added factual details.

D. Accepting the Union's Equal Protection Argument Requires Reversing the District Court's Interpretation of its Own Consent Decree

The rest of the Union's arguments ask this Court to reject the district court's interpretation of its own consent decree. In fact, the Union's sole equal protection challenge rests on its interpretation of the Decree.

First, without regard to the merits of the Union's interpretation of the Decree, any decision of this Court based on the meaning of this particular consent decree would necessarily rest on narrow grounds and would not illuminate any broad questions in employment discrimination law.

Second, unless this Court is inclined to reject the district court's interpretation of its own Decree, the Union's equal protection argument is unavailing.

The district court judge who has interpreted the Decree in this instance, Robert F. Peckham, is the same judge who presided

over the five years of litigation leading up to the Decree, entered the Decree in 1979 and oversaw its enforcement until his recent death. No one knew this Decree like Judge Peckham. Moreover, it is generally recognized that while consent decree interpretation receives *de novo* review, a court's interpretation of its own decree should be given deference. *Vertex Distributing, Inc. v. Falcon Foam Plastics, Inc.*, 168 F.2d 885, 893 (9th Cir. 1982); *Brown v. Neeb*, 644 F.2d 551, 558 n.12 (6th Cir. 1981).

Turning to the district court's interpretation, it squarely rejected the Union's contention that the Consent Decree erected a barrier to implementing otherwise lawful affirmative action plans. Judge Peckham concluded:

> the banding proposal is consistent with the stated goals of the decree, since it will increase the potential minority representation in the police department. One of the long range goals of the Consent Decree is to eradicate the present effects of past hiring and promotion practices with regard to minorities and women.

Officers for Justice (D.Ct.) at 29a. In rejecting the Union's argument he stated:

> In effect, the POA argues that the consent decree prohibits the City from taking affirmative action. Because intervenor's argument 'would require us to disregard the underlying purpose of the City's legitimate affirmative action plan, . . . we reject it.' *Higgins*, 823 F.2d at 353.

Id. at 34a.

Judge Wallace concurred:

> The Union contends that the banding proposal violates the consent decree because it unlawfully discriminates against nonminority candidates on the basis of race. Implicit in this contention is the claim that the Consent Decree prohibits the City from implementing a legitimate affirmative action plan.

Officers for Justice (Cir.) at 12a. The Ninth Circuit rejected this interpretation. *Id.* Further, Judge Wallace specifically rejected the

Union's interpretation of the Decree which formed the basis of its equal protection argument. *Id.* at 10a

CONCLUSION

For the foregoing reasons, the Union's Petition for a Writ of Certiorari should be denied.

Dated: March 5, 1993

Respectfully submitted,

ARMANDO M. MENOCAL III
LAURA J. SCHULKIND
PUBLIC ADVOCATES, INC.
Attorneys for Plaintiffs